

NORTH CAROLINA
COUNTY(S)

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION

<Insert Current Date>

AND

RAIL FREIGHT ASSISTANCE AGREEMENT
CONTINGENT INTEREST AGREEMENT
AND INSTRUMENT OF INDEBTEDNESS
RAIL FISCAL:
WBS:

OPERATING RAILROAD

AND

OWNER OF RIGHT OF WAY

THIS RAIL FREIGHT ASSISTANCE AND CONTINGENT INTEREST AGREEMENT AND INSTRUMENT OF INDEBTEDNESS, hereinafter referred to as "RFA & CI Agreement", is made and entered into on the last date executed below ("Effective Date") by and among the NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, an agency of the State of North Carolina, hereinafter referred to as the "Department", RAILROAD, a North Carolina corporation, hereinafter referred to as the "Railroad," and OWNER OF RIGHT OF WAY, hereinafter referred to as "Railroad Owner." The Department, Railroad, and Railroad Owner shall be hereinafter referred to individually as a "Party" and collectively as "Parties."

W I T N E S S E T H:

WHEREAS, Article 2D, Railroad Revitalization, of Chapter 136 of the North Carolina General Statutes, states that programs for railroad revitalization are vital to the continued growth and prosperity of the State and serve the public purpose; and,

WHEREAS, the Department is designated by N.C.G.S. §136-44.36 as the agency of the State of North Carolina responsible for administering all Federal and State programs related to railroad revitalization and grants the Department authority to do all things required under applicable federal and state legislation to administer properly the rail transportation programs within the State of North Carolina; and,

WHEREAS, the Department is authorized to distribute federal and state financial assistance for local railroad revitalization projects; and,

WHEREAS, the Department has authorized the distribution of state financial assistance to perform railroad infrastructure, health, and safety improvements for the operating efficiency of the rail corridor, hereinafter referred to as the "Project"; and,

WHEREAS, the Department's participation in the Project costs will be funded from the State's Freight Rail & Rail Crossing Safety Improvement Fund ("FRRCSI"); and,

WHEREAS, the Parties agree to participate in the cost of the Project as addressed in this Agreement and/or to assume the maintenance responsibilities as hereinafter set out; and,

WHEREAS, the Railroad Owner joins this Agreement for the purpose to pledge its property as security to insure performance of the Railroad under the terms of this Agreement; and,

WHEREAS, the Railroad agrees and understands that the state funds awarded pursuant to this Grant Agreement will be secured by the Railroad Owner granting to the Department a Contingent Interest in and an Equitable Lien to secure property, assets, and improvements purchased with such state funds.

NOW, THEREFORE, the Parties hereto, each in consideration of the promises and undertakings of the other as herein provided, do hereby covenant and agree, each with the other, as follows:

I. SCOPE OF WORK

The Project's Scope of Work shall consist of _____, and as further shown on the attached Exhibit A.

The Railroad, and/or its agent, shall perform the Scope of Work in accordance with the approved Project plans and specifications, and all Federal and State policies and procedures.

II. FUNDING – DEPARTMENT PARTICIPATION AND CONTINGENT INTEREST IN PROJECT

A. DEPARTMENT PARTICIPATION IN FUNDING

It is understood by the Parties hereto that the Department shall participate in the funding of the Scope of Work to the extent of _____ PERCENT (_____%) of the total Project costs or up to _____ (\$_____), whichever is less, hereinafter referred to as the "Grant Amount." Such Project costs eligible for payment by the Department are limited to the items listed in Exhibit A.

B. CONTINGENT INTEREST AGREEMENT AND INDEBTEDNESS

As a condition of its participation in the Project, the Department will retain a contingent interest in the Project for five (5) years following the Project completion, and in consideration of the Department's participation in the Project, the Railroad Owner agrees as follows:

1. Upon the sale or disposition of any part of the track or the filing of an application for abandonment of the track under Chapter 109 of Title 49 of the United States Code, the Department shall be entitled to a refund of a percentage of its entire financial investment in the Project facilities, equal to a

pro rata share during the five (5) year period following Project completion (i.e. 100% in year one, 80% in year two, 60% in year three, 40% in year four, and 20% in year five).

2. State funds paid to the Railroad by the Department pursuant to the Grant Agreement and which are subject to recovery pursuant to paragraph 1 above are hereby secured for the five-year period described in paragraph 1 above by an equitable lien on the property, assets or improvements purchased with such state funds for use in connection with the Project. The equitable lien shall secure and encumber such property, assets, or improvements in the percentage the state share bears to the total funds expended for the Project, which is FIFTY PERCENT (50%). The Department, Railroad, and Railroad Owner agree that during said five (5) year period the property, assets or improvements purchased with such state funds for use in connection with the Project are subject to sale if necessary to recover the state pro rata share of improvement costs in the event of a sale or disposition contemplated by Paragraph 1 above. The proceeds of such sale shall be used to reimburse the Department for the state funds granted to the Railroad pursuant to this Grant Agreement and as shown on Exhibit A.
3. For the purpose of this Agreement, the term "any sale or disposition of the line" shall mean any sale or disposition of the line (i) for a use not consistent with purposes for which the state share was originally granted, pursuant to this Grant Agreement, or (ii) for a use consistent with such purposes wherein the transferee in the sale or disposition does not enter into an assignment and assumption agreement with the Railroad with respect to the Railroad obligation under this or the Grant Agreement so that the transferee becomes obligated as if the transferee had been the original party.

III. PROFESSIONAL AND ENGINEERING SERVICES

The Railroad shall comply with the policies and procedures of this Section if Engineering and/or Construction Contract Administration is an eligible expense.

A. PRELIMINARY ENGINEERING AUTHORIZATION

If Preliminary Engineering is an eligible expense, then upon receipt of an executed Agreement, the Department will authorize Preliminary Engineering funds and shall notify the Railroad, in writing, once funds have been authorized and can be expended. The Railroad shall not initiate any work, nor solicit for any professional services, prior to receipt of written authorization from the Department to proceed. Any work performed or contracts executed, prior to receipt of written authorization to proceed will be ineligible for reimbursement.

B. IN-HOUSE STAFF

The Railroad may use qualified in-house professional services staff based on the Department's approval of a Scope of Services which details staff qualifications, staff time and wage rates. In the event in-house professional services staff is not used, the Railroad shall follow the Procurement of Professional Services set out in III. C. below:

C. PROCUREMENT OF PROFESSIONAL SERVICES

Contracts for engineering, design, or construction management services shall be subject to N.C.G.S. §143-64.31 through §143-64.34 and the Department's Policies and Procedures for Major Professional or Specialized Services Contracts, which require that if the estimated fee to be paid for such contracts is more than Fifty Thousand Dollars (\$50,000), then any advertisement for said contracts shall be pre-approved by the Department and the procurement of said services shall require qualifications-based selection.

Small Professional and Engineering Services Firms Requirements

Any contract entered into with another party to perform work associated with the requirements of this Agreement shall contain appropriate provisions regarding the utilization of Small Professional Services Firms (SPSF). This policy conforms to the SPSF Guidelines as approved by the North Carolina Board of Transportation.

- The Railroad shall not advertise nor enter into a contract for services performed as part of this Agreement, unless the Department provides written approval of the advertisement or the contents of the contract.
- If the Railroad fails to comply with these requirements, the Department will withhold funding until these requirements are met.

D. ENVIRONMENTAL DOCUMENTATION

It is understood by both Parties that there may not be any environmental documentation and/or applicable environmental permits required for the construction of the Project.

However, in the event said documentation and/or permits are required, the Grantee shall be responsible for the preparation of the environmental document and/or securing any applicable permits, needed to construct the Project. Said documentation shall be in accordance with the State Environmental Policy Act (SEPA) or as required and defined pursuant to N.C.G.S. §113A 1 through §113A 13 and all other appropriate environmental laws and regulations, at no expense to the Department. All work shall be performed in cooperation with the Department's Rail Planning and Development Branch personnel. All work will be done in accordance with applicable Federal and State standards, specifications, policies and procedures. Said documentation shall be submitted to the Department for review and approval.

E. DESIGN

The Railroad, and/or its agent, shall prepare the Project's plans, specifications, and an estimate of costs (PS&E package) needed to construct the Project. All work will be done in accordance with applicable Federal and State standards, specifications, policies and procedures. Project plans will be submitted to the Department for review and comment. The Department will submit all comments in writing to the Railroad within sixty (60) days of receipt of the plans from the Railroad. If no comments are received from the Department within sixty (60) days, the Department and Railroad shall conduct a conference call meeting within five (5) business days thereof to discuss the status of the plans review. If determined necessary for proper administration of the Project Work, the

Department reserves the right to review the Grantee's technical specifications and requirements.

IV. RIGHT OF WAY

It is understood that all work for the completion of the Project shall be contained within the existing right of way of the Railroad.

V. UTILITIES

It is understood by all Parties that there are no utilities in conflict with the Project.

In the event utility conflicts with the Project are discovered, the Railroad shall be solely responsible for all cost of the relocation and adjustment of the utility and at no liability whatsoever to the Department.

VI. CONSTRUCTION

A. CONSTRUCTION AUTHORIZATION

The Railroad may proceed with construction of the Project upon receipt of the executed Agreement and, if applicable, approval by the Department of any Third Party Contracts.

B. CONSTRUCTION PROCUREMENT

The Railroad will comply with all relevant state and federal statutes, rules, and regulations in procuring goods and services from third parties for construction of the Project. Third party contracts shall be approved by the Department prior to commencing Project work unless an approved continuing contractor will perform the work.

Compliance is mandatory with the following provisions:

- Contracts for construction or materials shall conform to N.C.G.S. §136-28.7, which requires that all steel and iron incorporated into the project shall be manufactured in the United States, with certain exceptions. Any contract for materials purchase should include assurances from the supplier that the materials conform to N.C.G.S. §136-28.7 and said assurance shall be provided to the Department upon its request. A standard provision for insertion into a contract for supplies is available from the Department upon request.
- Letting of contracts for construction and materials purchases shall be in accordance N.C.G.S. §143, Article 8 which requires competitive bidding and award to the lowest responsible bidder.

C. CONSTRUCTION SUBCONTRACTOR REQUIREMENTS

Minority and Women Businesses

It is the policy of the North Carolina Department of Transportation that Minority and Women Businesses Enterprises (MBE/WBE) shall have the maximum opportunity to

participate in the performance of contracts financed by Non-Federal funds. The Contractor is also encouraged to give every opportunity to allow MBE/WBE participation in Supplemental Agreements.

The MBE/WBE goals for this Agreement are as follows: 0% MBE, 0% WBE.

Any contract entered into with another party to perform work associated with the requirements of this Agreement shall contain appropriate provisions regarding the utilization of MBE/WBE, or as required and defined in G.S. 136-28.4 and the North Carolina Administrative Code (N.C.A.C.) Title 19A Chapter 2, Subchapter D. (See Attachment)

D. CONSTRUCTION PROCEDURE

The Railroad, and/or its agent, shall enter into and administer the construction contract for said work and the procedures set out herein below shall be followed:

1. Supervision.

The construction engineering and supervision will be furnished by the Railroad.

2. Right of Entry.

The Railroad agrees to provide the Department and /or its contractor(s) with right of entry for right to review project construction and for final field review as set forth below.

3. Right to Review and Approve/Reject.

The Department shall have the right to review the project construction and to approve or reject any portion of the project being performed by the Railroad or the Railroad's contractor, to ensure compliance with the provisions of this Agreement. The Department will furnish the Railroad with any forms that may be needed in order to follow standard Departmental practices and procedures in the administration and performance of the contract.

4. Change Orders.

During said work, if any changes in the plans are necessary, such changes must be approved by the Department prior to the work being performed.

5. Compliance with Standards and Specification.

All materials incorporated into the Project and workmanship performed by the Railroad shall be in reasonable close conformity with the Railroad's Standards and Specifications, applicable to such work on its own railroad system, in accordance with the Plans and Specifications approved by the Department, all Federal and State regulations, and generally consistent with the American Railway Engineering and Maintenance-of-Way Association (AREMA) recommended practice.

6. Final Field Review.

Prior to the final acceptance and payment by the Department, the Rail Division shall have the right to make a final field review of the completed work.

7. Signage.

During construction of the Project, the Railroad shall provide and maintain adequate barricades, signs, signal lights, flagmen, and other warning devices for the protection of traffic in conformation with standards and specifications of the Department and the current edition of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) published by the Federal Highway Administration.

8. Timeframe.

The Project must be complete and in service ("Project Completion") within eighteen (18) months after the execution of this Agreement. The Railroad will diligently pursue completion of its responsibilities on the Project.

a. Invoicing Required to Maintain Project Funds Active Status.

In the event invoices for on-going work are not received for any six (6)-month timeframe, the Department may rescind funding. The Railroad shall invoice the Department at least once every six (6) months to keep the Project funds active and available. If the Railroad is unable to invoice the Department because no work has been done, it must provide an explanation by letter or by electronic transmission. Failure to submit invoices or explanation may result in the Department recalling the unexpended balance of funds to be assigned to other Projects by the Board of Transportation.

b. Extensions.

The Railroad may petition the Department at least sixty (60) days in advance of the expiration of the Project Completion date of this Agreement for an extension of the eighteen (18) month period due to extenuating circumstances. The petition will be reviewed and a decision made by the appropriate Board of Transportation Committee. The Railroad will be notified of the Committee's decision within sixty (60) days.

9. Notification of Project Completion.

The Railroad shall provide the Department with written notification of Project Completion prior to requesting reimbursement. The aforesaid written notification by the Railroad to the Department shall constitute the Project Completion date.

10. Reporting.

The Railroad shall provide quarterly progress reports to the Department on its provided form. Progress reports shall indicate progress made, milestones achieved, and potential delaying factors.

VII. REIMBURSEMENT

A. SUBMITTAL OF INVOICE

Upon completion of work on the Project by the Railroad for periods of not less than a thirty (30) day period, the Railroad may submit an itemized invoice and any required supporting documentation to the Department's Rail Division for costs associated with the Project Work performed by the Railroad for that thirty (30) day period. By submittal of the invoice to the Department, the Railroad certifies that it has adhered to all applicable State and Federal laws, policies, rules, regulations and statutes as set forth in this Agreement. Payment to the Railroad shall be made upon review and approval of the invoice by the Department's Rail Division, Office of the Inspector General, and Financial Management Division.

B. REIMBURSEMENT TERMS

The Department, within thirty (30) calendar days of approval of an itemized invoice for the Project Work by the Office of Inspector General and Financial Management Division, shall submit the approved invoice amount to the Railroad for the Project Cost based upon the Scope of Work.

C. ADVANCE PAYMENT

Where economic hardship exists, the Railroad may bill the Department in advance for such items (necessary materials, labor or contractual costs) prior to incurring said costs. In order to receive subsequent advance payments, the expenses for previous payments must be substantiated. The Railroad must submit itemized invoices with appropriate documentation to the Department to account for said costs. No more than one request for an advance or reimbursement may be submitted during any thirty (30) day period. The invoice must be reviewed and approved by the Rail Division, Financial Management Division, and Office of Inspector General prior to additional advance payments or reimbursements. Once an Authorization for Construction is issued for a Project, the advance payment for that Project shall be allocated against the budget for the Project.

D. REIMBURSEMENT AT HIGHER MATCH FOR MATERIALS PROCUREMENT

The Railroad may request that the Department reimburse for materials procurement only at a higher match (80%) where the costs of project materials presents a financial hardship on the Railroad. Reimbursement at the increased rate for materials procurement shall not increase the total grant amount.

E. REIMBURSEMENT FOR FORCE ACCOUNT WORK

Any work performed by Railroad force account must be preapproved in writing by the Department. Subsequent invoices shall show a summary of labor, labor additives,

equipment, materials and other qualifying costs in conformance with the standards for costs set forth in the Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87), 2 C.F.R. § 225 (2015). Payment shall be based on actual cost incurred with the exception of equipment owned by the Railroad. Payment for use of equipment owned by the Railroad cannot exceed the Department's rates in effect for the time period in which the work is performed. Reimbursement for crosstie installation and surfacing shall be based on actual cost not to exceed a maximum cost determined by the Department. The maximum cost of a crosstie installation shall be \$18.70 per crosstie and the maximum cost of track surfacing shall be \$1.53 per foot. Requests for amounts exceeding the maximum cost for crosstie installation and surfacing must be approved by the Department, and will be based on documented hardship or other special circumstances. If work is performed by a contractor, said invoices shall show the contract cost.

F. ADDITIONAL REIMBURSEMENT GUIDANCE

1. Unsubstantiated Costs.

The Railroad agrees that it shall bear all costs for which it is unable to substantiate actual costs.

2. Incurred Costs.

Any costs incurred by the Railroad prior to execution of this Agreement shall not be eligible for reimbursement and shall be borne by the Railroad.

3. Costs Outside Scope.

The Department shall not reimburse the Railroad for the costs of any work outside the Scope of Work unless the Parties have a budget revision for such work.

4. Prior BOT Approval.

Any costs incurred by the Railroad prior to NC Board of Transportation approval shall not be eligible for reimbursement.

5. Final Payment.

Final payment will be made upon completion of the Project.

6. Reconciliation at Final Invoice and Program Close Out.

All invoices must be submitted within six (6) months of completion and acceptance of the work. The Department reserves the right to withhold payment on invoices received more than six (6) months after completion and acceptance of the work.

If, after reconciliation, the Department determines that the funds paid to the Railroad for the Project were not used in accordance with the terms of this Agreement, except when the Railroad is acting in good faith under the direction

of the Department, the Department will bill the Railroad. The Railroad shall reimburse the Department said amount of funds within thirty (30) days of written notification by the Department.

Representatives of the Department shall have such access to the books and accounts of the Railroad as may be required to audit said bill.

VIII. MAINTENANCE

The Railroad shall assume all liability and maintenance responsibilities for the improvements during and upon completion of the Project, except for those certain maintenance responsibilities for which local highway authorities are responsible when applicable.

It is agreed that the Project improvements will be owned by the Railroad and that upon completion of the Project the Railroad will be responsible for maintaining the Project tracks.

IX. OTHER PROVISIONS

A. TERMINATION OF PROJECT

The Parties may terminate this Agreement with 60 days' written notice to the other party, or as otherwise provided by law.

If, through any cause, the Railroad shall fail to fulfill its obligations under this Agreement in a timely and proper manner, including the failure to commence work on the Project within six (6) months, the Department shall have the right to terminate this Agreement by giving written notice to the Railroad per below and specifying the effective date thereof.

Failure on the part the Railroad and/or its contractor to comply with any of the provisions of this Agreement will be grounds for the Department to terminate participation in the costs of the Project and, if applicable, seek repayment of all cost expended by the Department, provided, however, that the Department shall first notify the Railroad of such failure in writing and provide the Railroad with sixty (60) days to cure same.

B. DEFAULT

The Department may, at its option, declare the Railroad to be in default with respect to this Agreement in the event of the occurrence of any of the following:

1. Substantial failure as determined by the Department to perform the Project as described in Exhibit A.
2. If Project tracks or other Project improvements are abandoned.
3. If Project tracks or other Project improvements are relocated or sold without the written approval of the Department.

If the Department determines that the Railroad has failed to meet its obligations under this Section IX. B. and/or is determined to be in default under the terms of this

Agreement, the Department shall be entitled to a pro rata share of its entire financial investment in the Project for the five (5)-year period following Project completion.

C. TRANSFER OF RESPONSIBILITIES

This Agreement is personal to the Railroad and shall not inure to the successors or assigns of the Railroad without the written approval of the Department.

The Department must approve any assignment or transfer of responsibilities of the Railroad set forth in this Agreement to other entities.

D. AGREEMENT MODIFICATIONS

Any modification to this Agreement will be agreed upon in writing by all Parties prior to being implemented.

E. INDEMNIFICATION

The Railroad agrees to protect, indemnify, and save the Department wholly harmless from and against the consequences of any damages or loss of life, personal injury, or property which may be caused by or result from the construction, maintenance, and use of the Project. The Railroad agrees to indemnify and hold harmless the Department, the State of North Carolina, and any of their officers, agents and employees, from any claims of third parties arising out of any act or omission of the Railroad in connection with the performance of this Agreement.

F. AVAILABILITY OF FUNDS

The Parties to this Agreement agree and understand that the payment of the sums specified in this Agreement is dependent and contingent upon and subject to the appropriation, allocation, and availability of funds for this purpose to the Department and the Agreement shall automatically terminate if funds cease to be available.

G. REPORTING REQUIREMENTS

1. NCgrants.gov reporting requirements:

Non-state grantees and private entities are required to comply with the reporting requirements in North Carolina General Statute 143C-6-22 through 23 and North Carolina Administrative Code Title 09, Section 03M-.0102 - .0802. Specifically, these statutes and administrative rules require that all non-state grantees and private entities that receive state funds must file annually with the North Carolina Office of State Budget and Management on <http://ncgrants.gov> the following forms according to grant amounts:

Level 1 Reporting: Receiving less than \$25,000:

- Certification Form
- State Grants Compliance Reporting: < \$25,000

Both forms above due within 6 months of organization's year end.

Level 2 Reporting: Receiving at least \$25,000 but less than \$750,000:

- Certification Form
- State Grants Compliance Reporting: \geq \$25,000
- Program Activities and Accomplishments Report
- Schedule of Receipts and Expenditures

All forms above due within 6 months of organization's year end.

Level 3 Reporting: Receiving \$750,000 or more:

- Certification Form
- State Grants Compliance Reporting: \geq \$25,000
- Program Activities and Accomplishments Report
- "Yellow Book" Audit done by CPA to include Schedule of Federal and State Awards

All forms and report due within 9 months of organization's year end.

Note: An A-133 audit may be substituted for the yellow book audit.

2. State Agency Grant Certification – No Overdue Tax Debts form:

The Railroad/Grantee agrees to complete a sworn written statement pursuant to N.C.G.S. 143C-6-23(c), stating that the Railroad/Grantee does not have any overdue tax debts, as defined by G.S. 105-243.1, at the Federal, State, or local level. A copy of a form statement is attached as Attachment 2. The Railroad/Grantee must complete the statement on the Railroad/Grantee's letterhead and attach to this Agreement as Attachment 2 and as part of the execution of this Agreement.

H. PROJECT RECORDS

The Railroad and its subcontractors will permit the Department and/or the Office of the State Auditor to inspect all work, materials, payrolls, and other data and records with regard to the Project and to audit all books, records, and accounts pertaining to the Project including books, documents, papers, accounting records, and such other evidence either in hard copy or electronic form as may be appropriate to substantiate costs incurred under this Agreement. Further, the Railroad shall make such materials available at its office at all reasonable times during the contract period, and for three (3) years respectively or until all audit exceptions have been resolved, whichever is longer, from the date of payment of the final voucher final payment under this project specific Agreement, for inspection and audit by the Department's Financial Management Section Office of State Auditor, and/or any authorized representatives. The Railroad and/or its Contractor shall permit the Department and/or Office of State Auditor full access to the Project site before, during, and after construction.

I. DEPARTMENT CONFLICT OF INTEREST

No member, officer or employee of the Department shall have any interest, direct or indirect, in this Agreement or the proceeds there from.

J. RAILROAD CONFLICT OF INTEREST

The Railroad shall file with the Department a copy of the Railroad's policy addressing conflicts of interest that may arise involving the railroad's management, employees and the members of its board of directors or other governing body. The policy shall address situations in which any of these individuals may directly or indirectly benefit, except as the Railroad's employees or members of its board or other governing body, from the Railroad's disbursing of State funds and shall include actions to be taken by the Railroad or the individual, or both to avoid conflicts of interest and the appearance of impropriety. The policy shall be filed before the Department may disburse the grant funds. [See N.C.G.S. 143C-6-23(b)]

K. CIVIL RIGHTS ACT

The Railroad and its subcontractors shall comply with all requirements imposed by Title VI of the Civil Rights Act of 1964 and shall not discriminate against any employee or applicant for employment based on race, religion, color, sex, or national origin.

L. EQUAL EMPLOYMENT OPPORTUNITY

In connection with the execution of the Agreement, the Railroad shall not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin. Such actions shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship.

M. NOTICES

All notices permitted or required to be given by one Party to the other and all questions about the contract from one Party to the other shall be addressed and delivered to the other Party's Contract Administrator. The name, post office address, street address, telephone number, fax number, and email address of the Parties' respective initial Contract Administrators are set out below. Either Party may change the name, post office address, street address, telephone number, fax number, or email address of its Contract Administrator by giving timely written notice to the other Party.

For the Department:

IF DELIVERED BY US POSTAL SERVICE:	IF DELIVERED BY ANY OTHER MEANS:
Neil Perry, Rail Planning Manager Planning and Development Branch NCDOT Rail Division 1553 Mail Service Center Raleigh, NC 27699-1553 Telephone 919-707-4711 Fax 919-715-6580 Email: nlperry@ncdot.gov	Neil Perry, Rail Planning Manager Planning and Development Branch NCDOT Rail Division 1 S Wilmington Street, Room 555 Raleigh, NC 27601

For the Railroad:

IF DELIVERED BY US POSTAL SERVICE:	IF DELIVERED BY ANY OTHER MEANS:
_____, _____ _____ _____ _____ Telephone: _____ Fax: _____ Email: _____	_____, _____ _____ _____ _____

For the Railroad Owner:

IF DELIVERED BY US POSTAL SERVICE:	IF DELIVERED BY ANY OTHER MEANS:
_____ _____, _____ _____ _____ Telephone: _____ Fax: _____ Email: _____	_____, _____ _____ _____ _____

N. DEBARMENT

Department Debarment Policy

It is the policy of the Department not to enter into any agreement with another party that has been debarred by any government agency (Federal or State). By execution of this Agreement, the Railroad certifies that to its knowledge neither it nor its agents or contractors are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any Federal or State Department or Agency and that it will not knowingly enter into agreements with any entity that is debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction.

Railroad Debarment Policy

Per Appendix XI to Part 200, the Compliance Supplement, of the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards, 2 C.F.R. § 200 (2015), the Railroad is prohibited from contracting with or making sub-awards under transactions covered by this Agreement to parties that are suspended or debarred or whose principals are suspended or debarred. Covered transactions include procurement contracts for goods or services equal to or in excess of \$25,000 and all non-procurement transactions (e.g., sub-awards to sub-recipients). Contractors receiving individual awards for \$25,000 or more and all sub-recipients must certify that the organization and its principals are not suspended or debarred. The Railroad may rely upon the certification unless it knows that the certification is erroneous. The Railroad agrees that it is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by Federal department or agency.

O. FORCE MAJEURE

Neither Party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations by any act of war, hostile foreign action, nuclear explosion, riot, strikes, civil insurrection, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.

P. E-VERIFY

E-Verify is the federal program operated by the United States Department of Homeland Security and other Federal agencies, or any successor or equivalent program, used to verify the work authorization of newly hired employees pursuant to federal law. The Parties warrant that they and any subcontractor performing work under this Agreement: (i) uses E-Verify if required to do so by North Carolina law; and (ii) otherwise complies with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes. A breach of this warranty by any Party will be considered a breach of this Agreement, which entitles the other Parties to terminate this Agreement, without penalty, upon notice to the breaching Party.

Q. IRAN DIVESTMENT ACT CERTIFICATION

The Department and the Railroad each hereby certify that, as of the date of this Agreement, neither it nor any of its contractors who have been selected to perform work under this Agreement are on the Final Divestment List as created by the State Treasurer pursuant to N. C. Gen. Stat. § 147-86.58. In compliance with the requirements of the Iran Divestment Act, N.C. Gen. Stat. § 147-86.55, *et seq.*, the Department and the Railroad each covenant that it shall not enter into a contract with a subcontractor to perform work under this Agreement if such subcontractor is at that time identified on the Final Divestment List.

R. ETHICS PROVISION

By Executive Order 24, issued by Governor Perdue, and N.C.G.S. § 133-32, it is unlawful for any vendor or contractor (i.e. architect, bidder, contractor, construction manager, design professional, engineer, landlord, offeror, seller, subcontractor, supplier, or vendor), to make gifts or to give favors to any State employee of the Governor's Cabinet Agencies (i.e., Administration, Commerce, Cultural Resources, Environment and Natural Resources, Health and Human Services, Public Safety, Revenue, Transportation, and the Office of the Governor).

IT IS UNDERSTOOD AND AGREED that the approval of the Project by the Department is subject to the conditions of this Agreement, and that no expenditures of funds on the part of the Department will be made until the terms of this Agreement have been complied with on the part of the Railroad and Railroad Owner.

Railroad
RF #
WBS

IN WITNESS WHEREOF, this RFA & CI Agreement has been executed, in duplicate originals, the last day and year heretofore set out below, on the part of the Department, Railroad, and Railroad Owner by authority duly given.

N.C.G.S. § 133-32 and Executive Order 24 prohibit the offer to, or acceptance by, any State Employee of any gift from anyone with a contract with the State, or from any person seeking to do business with the State. By execution of any response in this Agreement, you attest, for your entire organization and its employees or agents, that you are not aware that any gift in violation of N.C.G.S. § 133-32 and Executive Order 24 has been offered, accepted, or promised by any employees of your organization.

WITNESS

RAILROAD

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____

DATE: _____

DATE: _____

SEAL

Federal Tax Identification Number

Railroad

MAILING ADDRESS

ATTN: _____

IN WITNESS WHEREOF, this RFA & CI Agreement has been executed, in duplicate originals, the day and year heretofore set out below, on the part of the Department, Railroad, and Railroad Owner by authority duly given.

N.C.G.S. § 133-32 and Executive Order 24 prohibit the offer to, or acceptance by, any State Employee of any gift from anyone with a contract with the State, or from any person seeking to do business with the State. By execution of any response in this Agreement, you attest, for your entire organization and its employees or agents, that you are not aware that any gift in violation of N.C.G.S. § 133-32 and Executive Order 24 has been offered, accepted, or promised by any employees of your organization.

WITNESS

BY: _____

NAME: _____

TITLE: _____

DATE: _____

RAILROAD OWNER

BY: _____

NAME: _____

TITLE: _____

DATE: _____

SEAL

Federal Tax Identification Number

Railroad Owner

MAILING ADDRESS

ATTN: _____
email

IN WITNESS WHEREOF, this RFA & CI Agreement has been executed, in duplicate originals, the last day and year heretofore set out below, on the part of the Department, Railroad, and Railroad Owner by authority duly given.

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ATTEST

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION

BY: _____	BY: _____
NAME: _____	NAME: _____
TITLE: Secretary to Board of Transportation	TITLE: Deputy Secretary for Transit
DATE: _____	DATE: _____

MAILING ADDRESS

North Carolina Department of Transportation
Rail Division, Planning & Development Branch
1553 Mail Service Center
Raleigh, NC 27699-1553
ATTN: Neil Perry, Rail Planning Manager
nlperry@ncdot.gov

APPROVED BY BOARD OF TRANSPORTATION ITEM O: _____
(Date)

EXHIBIT A

Budget
Attached

Attachment 1

MINORITY BUSINESS ENTERPRISE AND WOMEN BUSINESS ENTERPRISE (RAILROAD/GRANTEE):

(10-16-07)(Rev. 5-21-13)

102-15(J)

SP1 G68

Description

The purpose of this Special Provision is to carry out the North Carolina Department of Transportation's policy of ensuring nondiscrimination in the award and administration of contracts financed in whole or in part with State funds.

Definitions

Additional MBE/WBE Subcontractors - Any MBE/WBE submitted at the time of bid that will not be used to meet either the MBE or WBE goal. No submittal of a Letter of Intent is required.

Committed MBE/WBE Subcontractor - Any MBE/WBE submitted at the time of bid that is being used to meet either the MBE or WBE goal by submission of a Letter of Intent. Or any MBE or WBE used as a replacement for a previously committed MBE or WBE firm.

Contract Goals Requirement - The approved MBE and WBE participation at time of award, but not greater than the advertised contract goals for each.

Goal Confirmation Letter - Written documentation from the RR to the bidder confirming the Contractor's approved, committed MBE and WBE participation along with a listing of the committed MBE and WBE firms.

Railroad (RR) - The entity letting the contract for the construction of the project funded by the Agreement.

Manufacturer - A firm that operates or maintains a factory or establishment that produces on the premises, the materials or supplies obtained by the Contractor.

MBE Goal - A portion of the total contract, expressed as a percentage that is to be performed by committed MBE subcontractor(s).

Minority Business Enterprise (MBE) - A firm certified as a Disadvantaged Minority-Owned Business Enterprise through the North Carolina Unified Certification Program.

Regular Dealer - A firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. A regular dealer engages in, as its principal business and in its own name, the purchase and sale or lease of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns and operates distribution equipment for the products. Brokers and packagers are not regarded as manufacturers or regular dealers within the meaning of this section.

North Carolina Unified Certification Program (NCUCP) - A program that provides comprehensive services and information to applicants for MBE/WBE certification. The MBE/WBE program follows the same regulations as the federal Disadvantaged Business Enterprise (DBE) program in accordance with 49 CFR Part 26.

Standard Specifications - The general term comprising all directions, provisions, and requirements contained or referred to in the *North Carolina Department of Transportation Standard Specifications for Roads and Structures* and any subsequent revisions or additions to such book.

United States Department of Transportation (USDOT) - Federal agency responsible for issuing regulations (49 CFR Part 26) and official guidance for the DBE program.

WBE Goal - A portion of the total contract, expressed as a percentage that is to be performed by committed WBE subcontractor(s).

Women Business Enterprise (WBE) - A firm certified as a Disadvantaged Women-Owned Business Enterprise through the North Carolina Unified Certification Program.

Forms and Websites Referenced in this Provision

Payment Tracking System - On-line system in which the Contractor enters the payments made to MBE and WBE subcontractors who have performed work on the project.
<https://apps.dot.state.nc.us/Vendor/PaymentTracking/>

DBE-IS Subcontractor Payment Information - Form for reporting the payments made to all MBE/WBE firms working on the project. This form is for paper bid projects only.
<http://www.ncdot.org/doh/forms/files/DBE-IS.xls>

RF-1 MBE/WBE Replacement Request Form - Form for replacing a committed MBE or WBE.
<http://connect.ncdot.gov/projects/construction/Construction%20Forms/DBE%20MBE%20WBE%20Replacement%20Request%20Form.pdf>

SAF Subcontract Approval Form - Form required for approval to sublet the contract.
<http://connect.ncdot.gov/projects/construction/Construction%20Forms/Subcontract%20Approval%20Form%20Rev.%202012.zip>

JC-1 Joint Check Notification Form - Form and procedures for joint check notification. The form acts as a written joint check agreement among the parties providing full and prompt disclosure of the expected use of joint checks.
<http://connect.ncdot.gov/projects/construction/Construction%20Forms/Joint%20Check%20Notification%20Form.pdf>

Letter of Intent - Form signed by the Contractor and the MBE/WBE subcontractor, manufacturer or regular dealer that affirms that a portion of said contract is going to be performed by the signed MBE/WBE for the amount listed at the time of bid.
<http://connect.ncdot.gov/letting/LetCentral/Letter%20of%20Intent%20to%20Perform%20as%20a%20Subcontractor.pdf>

Listing of MBE and WBE Subcontractors Form - Form for entering MBE/WBE subcontractors on a project that will meet this MBE and WBE goals. This form is for paper bids only.

[http://connect.ncdot.gov/municipalities/Bid%20Proposals%20for%20LGA%20Content/09%20MBE-WBE%20Subcontractors%20\(State\).doc](http://connect.ncdot.gov/municipalities/Bid%20Proposals%20for%20LGA%20Content/09%20MBE-WBE%20Subcontractors%20(State).doc)

Subcontractor Quote Comparison Sheet - Spreadsheet for showing all subcontractor quotes in the work areas where MBEs and WBEs quoted on the project. This sheet is submitted with good faith effort packages.

<http://connect.ncdot.gov/business/SmallBusiness/Documents/DBE%20Subcontractor%20Quote%20Comparison%20Example.xls>

MBE and WBE Goal

The following goals for participation by Minority Business Enterprises and Women Business Enterprises are established for this contract:

(A) Minority Business Enterprises **[number to the nearest tenth]** 0%

- (1) *If the MBE goal is more than zero*, the Contractor shall exercise all necessary and reasonable steps to ensure that MBEs participate in at least the percent of the contract as set forth above as the MBE goal.
- (2) *If the MBE goal is zero*, the Contractor shall make an effort to recruit and use MBEs during the performance of the contract. Any MBE participation obtained shall be reported to the Railroad.

(B) Women Business Enterprises **[number to the nearest tenth]** 0%

- (1) *If the WBE goal is more than zero*, the Contractor shall exercise all necessary and reasonable steps to ensure that WBEs participate in at least the percent of the contract as set forth above as the WBE goal.
- (2) *If the WBE goal is zero*, the Contractor shall make an effort to recruit and use WBEs during the performance of the contract. Any WBE participation obtained shall be reported to the Railroad.

Directory of Transportation Firms (Directory)

Real-time information is available about firms doing business with the NCDOT and firms that are certified through NCUCP in the Directory of Transportation Firms. Only firms identified in the Directory as MBE and WBE certified shall be used to meet the MBE and WBE goals respectively. The Directory can be found at the following link.
<https://partner.ncdot.gov/VendorDirectory/default.html>

The listing of an individual firm in the directory shall not be construed as an endorsement of the firm's capability to perform certain work.

Listing of MBE/WBE Subcontractors

At the time of bid, bidders shall submit all MBE and WBE participation that they anticipate to use during the life of the contract. Only those identified to meet the MBE goal and the WBE goal will be considered committed, even though the listing shall include both committed MBE/WBE subcontractors and additional MBE/WBE subcontractors. Any additional

MBE/WBE subcontractor participation submitted at the time of bid will be used toward overall race-neutral goals. Only those firms with current MBE and WBE certification at the time of bid opening will be acceptable for listing in the bidder's submittal of MBE and WBE participation. The Contractor shall indicate the following required information:

Blank forms will not be deemed to represent zero participation. Bids submitted that do not have MBE and WBE participation indicated on the appropriate form will not be read publicly during the opening of bids. The Railroad will not consider these bids for award and the proposal will be rejected.

(A) *If either the MBE or WBE goal is more than zero,*

- (1) Bidders, at the time the bid proposal is submitted, shall submit a listing of MBE/WBE participation, including the names and addresses on *Listing of MBE and WBE Subcontractors* contained elsewhere in the contract documents in order for the bid to be considered responsive. Bidders shall indicate the total dollar value of the MBE and WBE participation for the contract.
- (2) If bidders have no MBE or WBE participation, they shall indicate this on the *Listing of MBE and WBE Subcontractors* by entering the word "None" or the number "0." This form shall be completed in its entirety.
- (3) The bidder shall be responsible for ensuring that the MBE/WBE is certified at the time of bid by checking the Directory of Transportation Firms. If the firm is not certified at the time of the bid-letting, that MBE's or WBE's participation will not count towards achieving the corresponding goal.

(B) *If either the MBE or WBE goal is zero,* bidders, at the time the bid proposal is submitted, shall enter the word "None"; or the number "0"; or if there is participation, add the value on the *Listing of MBE and WBE Subcontractors* contained elsewhere in the contract documents.

MBE or WBE Prime Contractor

When a certified MBE or WBE firm bids on a contract that contains MBE and WBE goals, the firm is responsible for meeting the goals or making good faith efforts to meet the goals, just like any other bidder. In most cases, a MBE or WBE bidder on a contract will meet one of the goals by virtue of the work it performs on the contract with its own forces. However, all the work that is performed by the MBE or WBE bidder and any other similarly certified subcontractors will count toward the goal. The MBE or WBE bidder shall list itself along with any MBE or WBE subcontractors, if any, in order to receive credit toward the goals.

For example, on a proposed contract, the WBE goal is 10%, and the MBE goal is 8%. A WBE bidder puts in a bid where they will perform 40% of the contract work and have a WBE subcontractor which will perform another 5% of the work. Together the two WBE firms submit on the *Listing of MBE and WBE Subcontractors* a value of 45% of the contract which fulfills the WBE goal. The 8% MBE goal shall be obtained through MBE participation with MBE certified subcontractors or documented through a good faith effort. It should be noted that you cannot combine the two goals to meet an overall value. The two goals shall remain separate.

MBE/WBE prime contractors shall also follow Sections A or B listed under *Listing of MBE/WBE*

Subcontractors just as a non-MBE/WBE bidder would.

Written Documentation – Letter of Intent

The bidder shall submit written documentation for each MBE/WBE that will be used to meet the MBE and WBE goals of the contract, indicating the bidder's commitment to use the MBE/WBE in the contract. This documentation shall be submitted on the NCDOT's form titled *Letter of Intent*.

The documentation shall be received in the office of the NCDOT, Rail Division, no later than 12:00 noon of the sixth calendar day following opening of bids, unless the sixth day falls on Saturday, Sunday or an official state holiday. In that situation, it is due in the office of the NCDOT, Rail Division, no later than 12:00 noon on the next official state business day.

If the bidder fails to submit the Letter of Intent from each committed MBE and WBE to be used toward the MBE and WBE goals, or if the form is incomplete (i.e. both signatures are not present), the MBE/WBE participation will not count toward meeting the MBE/WBE goal. If the lack of this participation drops the commitment below either the MBE or WBE goal, the Contractor shall submit evidence of good faith efforts for the goal not met, completed in its entirety, to the NCDOT, Rail Division, no later than 12:00 noon of the eighth calendar day following opening of bids, unless the eighth day falls on Saturday, Sunday or an official state holiday. In that situation, it is due in the office of the NCDOT, Rail Division, no later than 12:00 noon on the next official state business day.

Submission of Good Faith Effort

If the bidder fails to meet or exceed either the MBE or the WBE goal, the apparent lowest responsive bidder shall submit to the Railroad documentation of adequate good faith efforts made to reach that specific goal(s).

One complete set of this information shall be received in the office of the NCDOT, Rail Division, no later than 12:00 noon of the sixth calendar day following opening of bids, unless the sixth day falls on Saturday, Sunday or an official state holiday. In that situation, it is due in the office of the NCDOT, Rail Division, no later than 12:00 noon on the next official state business day.

Note: Where the information submitted includes repetitious solicitation letters, it will be acceptable to submit a representative letter along with a distribution list of the firms that were solicited. Documentation of MBE/WBE quotations shall be a part of the good faith effort submittal. This documentation may include written subcontractor quotations, telephone log notations of verbal quotations, or other types of quotation documentation.

Consideration of Good Faith Effort for Projects with MBE/WBE Goals More Than Zero

Adequate good faith efforts mean that the bidder took all necessary and reasonable steps to achieve the goal which, by their scope, intensity, and appropriateness, could reasonably be expected to obtain sufficient MBE/WBE participation. Adequate good faith efforts also mean that the bidder actively and aggressively sought MBE/WBE participation. Mere *pro forma* efforts are not considered good faith efforts.

The Railroad will consider the quality, quantity, and intensity of the different kinds of efforts a bidder has made. Listed below are examples of the types of actions a bidder will take in making

a good faith effort to meet the goals and are not intended to be exclusive or exhaustive, nor is it intended to be a mandatory checklist.

- (A) Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising, written notices, use of verifiable electronic means through the use of the NCDOT Directory of Transportation Firms) the interest of all certified MBEs/WBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within at least 10 days prior to bid opening to allow the MBEs/WBEs to respond to the solicitation. Solicitation shall provide the opportunity to MBEs/WBEs within the Division and surrounding Divisions where the project is located. The bidder must determine with certainty if the MBEs/WBEs are interested by taking appropriate steps to follow up initial solicitations.
- (B) Selecting portions of the work to be performed by MBEs/WBEs in order to increase the likelihood that the MBE and WBE goals will be achieved.
 - (1) Where appropriate, break out contract work items into economically feasible units to facilitate MBE/WBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - (2) Negotiate with subcontractors to assume part of the responsibility to meet the contract MBE/WBE goals when the work to be sublet includes potential for MBE/WBE participation (2nd and 3rd tier subcontractors).
- (C) Providing interested MBEs/WBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- (D)
 - (1) Negotiating in good faith with interested MBEs/WBEs. It is the bidder's responsibility to make a portion of the work available to MBE/WBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available MBE/WBE subcontractors and suppliers, so as to facilitate MBE/WBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of MBEs/WBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for MBEs/WBEs to perform the work.
 - (2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including MBE/WBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using MBEs/WBEs is not in itself sufficient reason for a bidder's failure to meet the contract MBE or WBE goals, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Bidding contractors are not, however, required to accept higher quotes from MBEs/WBEs if the price difference is excessive or unreasonable.

- (E) Not rejecting MBEs/WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The bidder's standing within its industry, membership in specific groups, organizations, or associates and political or social affiliations (for example, union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the bidder's efforts to meet the project goal.
- (F) Making efforts to assist interested MBEs/WBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or bidder.
- (G) Making efforts to assist interested MBEs/WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- (H) Effectively using the services of available minority/women community organizations; minority/women contractors' groups; Federal, State, and local minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of MBEs/WBEs. Contact within 7 days from the bid opening NCDOT's Business Development Manager in the Business Opportunity and Work Force Development Unit to give notification of the bidder's inability to get MBE or WBE quotes.
- (I) Any other evidence that the bidder submits which shows that the bidder has made reasonable good faith efforts to meet the MBE and WBE goal.

In addition, the Railroad may take into account the following:

- (1) Whether the bidder's documentation reflects a clear and realistic plan for achieving the MBE and WBE goals.
- (2) The bidders' past performance in meeting the MBE and WBE goals.
- (3) The performance of other bidders in meeting the MBE and WBE goals. For example, when the apparent successful bidder fails to meet the goals, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts the apparent successful bidder could have met the goals. If the apparent successful bidder fails to meet the MBE and WBE goals, but meets or exceeds the average MBE and WBE participation obtained by other bidders, the Railroad may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made a good faith effort.

If the Railroad does not award the contract to the apparent lowest responsive bidder, the Railroad reserves the right to award the contract to the next lowest responsive bidder that can satisfy to the Railroad that the MBE and WBE goals can be met or that an adequate good faith effort has been made to meet the MBE and WBE goals.

Non-Good Faith Appeal

The NCDOT, Rail Division, will notify the contractor verbally and in writing of non-good faith. A contractor may appeal a determination of non-good faith made by the Goal Compliance Committee. If a contractor wishes to appeal the determination made by the Committee, they shall provide written notification to the NCDOT, Rail Division. The appeal shall be made within

2 business days of notification of the determination of non-good faith.

Counting MBE/WBE Participation Toward Meeting MBE/WBE Goals

(A) Participation

The total dollar value of the participation by a committed MBE/WBE will be counted toward the contract goal requirements. The total dollar value of participation by a committed MBE/WBE will be based upon the value of work actually performed by the MBE/WBE and the actual payments to MBE/WBE firms by the Contractor.

(B) Joint Checks

Prior notification of joint check use shall be required when counting MBE/WBE participation for services or purchases that involves the use of a joint check. Notification shall be through submission of Form JC-1 (*Joint Check Notification Form*) and the use of joint checks shall be in accordance with the NCDOT's Joint Check Procedures.

(C) Subcontracts (Non-Trucking)

A MBE/WBE may enter into subcontracts. Work that a MBE subcontracts to another MBE firm may be counted toward the MBE contract goal requirement. The same holds for work that a WBE subcontracts to another WBE firm. Work that a MBE subcontracts to a non-MBE firm does not count toward the MBE contract goal requirement. Again, the same holds true for the work that a WBE subcontracts to a non-WBE firm. If a MBE or WBE contractor or subcontractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of standard industry practices, it shall be presumed that the MBE or WBE is not performing a commercially useful function. The MBE/WBE may present evidence to rebut this presumption to the Railroad. The Railroad's decision on the rebuttal of this presumption may be subject to review by the Office of Inspector General, NCDOT.

(D) Joint Venture

When a MBE or WBE performs as a participant in a joint venture, the Contractor may count toward its contract goal requirement a portion of the total value of participation with the MBE or WBE in the joint venture, that portion of the total dollar value being a distinct clearly defined portion of work that the MBE or WBE performs with its forces.

(E) Suppliers

A contractor may count toward its MBE or WBE requirement 60 percent of its expenditures for materials and supplies required to complete the contract and obtained from a MBE or WBE regular dealer and 100 percent of such expenditures from a MBE or WBE manufacturer.

(F) Manufacturers and Regular Dealers

A contractor may count toward its MBE or WBE requirement the following expenditures to MBE/WBE firms that are not manufacturers or regular dealers:

- (1) The fees or commissions charged by a MBE/WBE firm for providing a *bona fide* service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, provided the fees or commissions are determined to be reasonable and not excessive as compared with fees and commissions customarily allowed for similar services.
- (2) With respect to materials or supplies purchased from a MBE/WBE, which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site (but not the cost of the materials and supplies themselves), provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.

Commercially Useful Function

(A) MBE/WBE Utilization

The Contractor may count toward its contract goal requirement only expenditures to MBEs and WBEs that perform a commercially useful function in the work of a contract. A MBE/WBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the MBE/WBE shall also be responsible with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself. To determine whether a MBE/WBE is performing a commercially useful function, the Railroad will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the MBE/WBE credit claimed for its performance of the work, and any other relevant factors.

(B) MBE/WBE Utilization in Trucking

The following factors will be used to determine if a MBE or WBE trucking firm is performing a commercially useful function.

- (1) The MBE/WBE shall be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there shall not be a contrived arrangement for the purpose of meeting the MBE or WBE goal.
- (2) The MBE/WBE shall itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

- (3) The MBE/WBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- (4) The MBE may subcontract the work to another MBE firm, including an owner-operator who is certified as a MBE. The same holds true that a WBE may subcontract the work to another WBE firm, including an owner-operator who is certified as a WBE. When this occurs, the MBE or WBE who subcontracts work receives credit for the total value of the transportation services the subcontracted MBE or WBE provides on the contract. It should be noted that every effort shall be made by MBE and WBE contractors to subcontract to the same certification (i.e., MBEs to MBEs and WBEs to WBEs), in order to fulfill the goal requirement. This, however, may not always be possible due to the limitation of firms in the area. If the MBE or WBE firm shows a good faith effort has been made to reach out to similarly certified transportation service providers and there is no interest or availability, and they can get assistance from other certified providers, the NCDOT, Rail Division, will not hold the prime liable for meeting the goal.
- (5) The MBE/WBE may also subcontract the work to a non-MBE/WBE firm, including from an owner-operator. The MBE/WBE who subcontracts the work to a non-MBE/WBE is entitled to credit for the total value of transportation services provided by the non-MBE/WBE subcontractor not to exceed the value of transportation services provided by MBE/WBE-owned trucks on the contract. Additional participation by non-MBE/WBE subcontractors receives credit only for the fee or commission it receives as a result of the subcontract arrangement. The value of services performed under subcontract agreements between the MBE/WBE and the Contractor will not count towards the MBE/WBE contract requirement.
- (6) A MBE/WBE may lease truck(s) from an established equipment leasing business open to the general public. The lease must indicate that the MBE/WBE has exclusive use of and control over the truck. This requirement does not preclude the leased truck from working for others during the term of the lease with the consent of the MBE/WBE, so long as the lease gives the MBE/WBE absolute priority for use of the leased truck. This type of lease may count toward the MBE/WBE's credit as long as the driver is under the MBE/WBE's payroll.
- (7) Subcontracted/leased trucks shall display clearly on the dashboard the name of the MBE/WBE that they are subcontracted/leased to and their own company name if it is not identified on the truck itself. Magnetic door signs are not permitted.

MBE/WBE Replacement

When a Contractor has relied on a commitment to a MBE or WBE firm (or an approved substitute MBE or WBE firm) to meet all or part of a contract goal requirement, the contractor shall not terminate the MBE/WBE for convenience. This includes, but is not limited to, instances in which the Contractor seeks to perform the work of the terminated subcontractor with another MBE/WBE subcontractor, a non-MBE/WBE subcontractor, or with the Contractor's own forces or those of an affiliate. A MBE/WBE may only be terminated after receiving the written approval

of the NCDOT, Rail Division, based upon a finding of good cause for the termination.

All requests for replacement of a committed MBE/WBE firm shall be submitted to the NCDOT, Rail Division, for approval on Form RF-1 (*Replacement Request*). If the Contractor fails to follow this procedure, the Contractor may be disqualified from further bidding for a period of up to 6 months.

The Contractor shall comply with the following for replacement of a committed MBE/WBE:

(A) Performance Related Replacement

When a committed MBE is terminated for good cause as stated above, an additional MBE that was submitted at the time of bid may be used to fulfill the MBE commitment. The same holds true if a committed WBE is terminated for good cause, an additional WBE that was submitted at the time of bid may be used to fulfill the WBE goal. A good faith effort will only be required for removing a committed MBE/WBE if there were no additional MBEs/WBEs submitted at the time of bid to cover the same amount of work as the MBE/WBE that was terminated.

If a replacement MBE/WBE is not found that can perform at least the same amount of work as the terminated MBE/WBE, the Contractor shall submit a good faith effort documenting the steps taken. Such documentation shall include, but not be limited to, the following:

- (1) Copies of written notification to MBEs/WBEs that their interest is solicited in contracting the work defaulted by the previous MBE/WBE or in subcontracting other items of work in the contract.
- (2) Efforts to negotiate with MBEs/WBEs for specific subbids including, at a minimum:
 - (a) The names, addresses, and telephone numbers of MBEs/WBEs who were contacted.
 - (b) A description of the information provided to MBEs/WBEs regarding the plans and specifications for portions of the work to be performed.
- (3) A list of reasons why MBE/WBE quotes were not accepted.
- (4) Efforts made to assist the MBEs/WBEs contacted, if needed, in obtaining bonding or insurance required by the Contractor.

(B) Decertification Replacement

- (1) When a committed MBE/WBE is decertified by NCDOT after the SAF (*Subcontract Approval Form*) has been received by the Railroad, the Railroad will not require the Contractor to solicit replacement MBE/WBE participation equal to the remaining work to be performed by the decertified firm. The participation equal to the remaining work performed by the decertified firm will count toward the contract goal requirement.
- (2) When a committed MBE/WBE is decertified prior to the Railroad receiving the

SAF (*Subcontract Approval Form*) for the named MBE/WBE firm, the Contractor shall take all necessary and reasonable steps to replace the MBE/WBE subcontractor with another similarly certified MBE/WBE subcontractor to perform at least the same amount of work to meet the MBE/WBE goal requirement. If a MBE/WBE firm is not found to do the same amount of work, a good faith effort must be submitted to the NCDOT, Rail Division (see A herein for required documentation).

Changes in the Work

When the NCDOT, Rail Division, makes changes that result in the reduction or elimination of work to be performed by a committed MBE/WBE, the Contractor will not be required to seek additional participation. When the NCDOT, Rail Division, makes changes that result in additional work to be performed by a MBE/WBE based upon the Contractor's commitment, the MBE/WBE shall participate in additional work to the same extent as the MBE/WBE participated in the original contract work.

When the NCDOT, Rail Division, makes changes that result in extra work, which has more than a minimal impact on the contract amount, the Contractor shall seek additional participation by MBEs/WBEs unless otherwise approved by the NCDOT, Rail Division.

When the NCDOT, Rail Division, makes changes that result in an alteration of plans or details of construction, and a portion or all of the work had been expected to be performed by a committed MBE/WBE, the Contractor shall seek participation by MBEs/WBEs unless otherwise approved by the NCDOT, Rail Division,.

When the Contractor requests changes in the work that result in the reduction or elimination of work that the Contractor committed to be performed by a MBE/WBE, the Contractor shall seek additional participation by MBEs/WBEs equal to the reduced MBE/WBE participation caused by the changes.

Reports and Documentation

A SAF (*Subcontract Approval Form*) shall be submitted for all work which is to be performed by a MBE/WBE subcontractor. The Railroad reserves the right to require copies of actual subcontract agreements involving MBE/WBE subcontractors.

When using transportation services to meet the contract commitment, the Contractor shall submit a proposed trucking plan in addition to the SAF. The plan shall be submitted prior to beginning construction on the project. The plan shall include the names of all trucking firms proposed for use, their certification type(s), the number of trucks owned by the firm, as well as the individual truck identification numbers, and the line item(s) being performed.

Within 30 calendar days of entering into an agreement with a MBE/WBE for materials, supplies or services, not otherwise documented by the SAF as specified above, the Contractor shall furnish the NCDOT, Rail Division, a copy of the agreement. The documentation shall also indicate the percentage (60% or 100%) of expenditures claimed for MBE/WBE credit.

Reporting Minority and Women Business Enterprise Participation

The Contractor shall provide the NCDOT, Rail Division, with an accounting of payments made

to all MBE and WBE firms, including material suppliers and contractors at all levels (prime, subcontractor, or second tier subcontractor). This accounting shall be furnished to the NCDOT, Rail Division, for any given month by the end of the following month. Failure to submit this information accordingly may result in the following action:

- (A) Withholding of money due in the next partial pay estimate; or
- (B) Removal of an approved contractor from the prequalified bidders' list or the removal of other entities from the approved subcontractors list. (RR may add to, change or delete this section.)

While each contractor (prime, subcontractor, 2nd tier subcontractor) is responsible for accurate accounting of payments to MBEs/WBEs, it shall be the prime contractor's responsibility to report all monthly and final payment information in the correct reporting manner.

Failure on the part of the Contractor to submit the required information in the time frame specified may result in the disqualification of that contractor and any affiliate companies from further bidding until the required information is submitted.

Failure on the part of any subcontractor to submit the required information in the time frame specified may result in the disqualification of that contractor and any affiliate companies from being approved for further work on future projects until the required information is submitted.

Contractors reporting transportation services provided by non-MBE/WBE lessees shall evaluate the value of services provided during the month of the reporting period only.

At any time, the NCDOT, Rail Division, can request written verification of subcontractor payments.

The Contractor shall report the accounting of payments on the NCDOT's DBE-IS (*Subcontractor Payment Information*) with each invoice. Invoices will not be processed for payment until the DBE-IS is received.

Failure to Meet Contract Requirements

Failure to meet contract requirements in accordance with Sub article 102-15(J) of the *2012 Standard Specifications* may be cause to disqualify the Contractor.

Attachment 2 - State Grant Certification – No Overdue Tax Debts

Instructions: Railroad should complete this certification for all state funds received. The completed and signed form should be provided to the state agency funding the grant to be attached to the contract for the grant funds. A copy of this form, along with the completed contract, should be kept by the funding agency and available for review by the Office of State Budget and Management.

This certification form is included with this Agreement as a separate form.